

No. 2915.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

CENTRAL CALIFORNIA CANNERIES CO.,

Appellant,

vs.

DUNKLEY COMPANY,

Appellee.

Brief of Appellee.

FRED L. CHAPPELL,
JOHN H. MILLER,
Counsel for Appellee.

Filed this.....day of March, A. D. 1917.

F. D. MONCKTON, Clerk.

By....., Deputy.

The James H. Barry Co., 1122 Mission St., San Francisco

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F. D. Monckton,
Clerk.

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CENTRAL CALIFORNIA CAN-	}	In Equity No. 2915
NERIES COMPANY, et al.,		
<i>Defendants-Appellants,</i>		
vs.		
DUNKLEY COMPANY,		
<i>Plaintiff-Appellee.</i>		

BRIEF FOR PLAINTIFF-APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from the decision and decree of the District Court of the United States for the Northern District of California, Southern Division, holding United States Letters patent No. 1,104,175 of July 21, 1914, to be the property of plaintiff-appellee, to be a good and valid patent, and to have been infringed by defendants-appellants. An injunction and accounting was ordered as to Claims 1 to 6 inclusive, 14 to 16 inclusive, and 19 to 26 inclusive. The decree appears beginning at R. p. 700.

ASSIGNMENTS OF ERROR.

The assignments of error begin at R. p. 711 and are twenty-five in number. The first assignment is *general* as to error in granting an injunction. The second is *general* as to error in granting any relief. The third is *general* in not dismissing the bill.

The fourth assignment is *general* in alleging error in the court's finding or adjudging that the defendants had *infringed* the patent. The fifth assignment is to *infringement*, specifying each of the claims separately.

The sixth assignment is *general* as to adjudging the letters patent to be *good* and *valid* in law. The seventh is general as to the finding of *validity* as to any of the *claims*. The eighth is general as to validity except that it enumerates specifically all the claims involved.

The ninth assignment alleges generally that the court erred in the matter of *fact* in finding that Samuel J. Dunkley was the first, original or any inventor. The tenth assignment is the same as the ninth except that it enumerates the claims in detail. The eleventh assignment alleges peculiar error in that it said that the

“court erred in finding or adjudging that plaintiff had proved or established *beyond a reasonable doubt* the alleged date of the alleged inventing by the said Dunkley.”

The twelfth assignment is inconsequential, as it alleges that the court erred in not finding that one *Stewart L. Campbell* was the inventor.

The thirteenth assignment is a similar assignment as to one *Vernon* being the first inventor. Assignments fourteen and fifteen also relate particularly to *Vernon*.

The sixteenth assignment relates to error in not finding priority of invention by one *G. E. Grier*, as does also the seventeenth assignment. The eighteenth and nineteenth assignments are substantially continuations of the *Grier* assignments, under the name of *Pasadena Canning Co.* The twentieth assignment is a continuation of the *Grier* anticipation under the name of the *Eastside Canning Company*.

The twenty-first assignment relates to the matter of the plaintiff being in court with *unclean hands*, an entirely inconsequential assignment, as there is no evidence bearing on this proposition at all.

Assignments twenty-two and twenty-three allege error because a letter written to and a letter from one *Kennedy* were not considered in evidence.

Assignment twenty-four relates to the exclusion of a certain affidavit of *Robert I. Bentley* and to his answering questions relative thereto.

Assignment twenty-five is absolutely general, a catch-all, and gives no guide to any proposition that may need to be considered in this behalf.

THE DEFENSES.

The defenses for the defendants to be reviewed by this Court are purely matters of *fact*:

(1) That Samuel J. Dunkley was not the first and original inventor of the particular things recited in the claims enumerated.

(2) That the invention was produced by Stewart L. Campbell prior to the date of production thereof by the said Dunkley.

(3) That the invention was produced prior to Dunkley by C. J. Vernon.

(4) That the invention was produced prior to Dunkley by G. E. Grier of Pasadena.

It was substantially conceded in the court below that if Dunkley was the first inventor, the patent is good and valid and infringed by the structures made use of by the defendants. There is no evidence to meet the presumption of validity of the patent and the proof that defendants' machines respond to the claims and that there is infringement.

A review of the assignments of error seems clearly to indicate that none of the prior patents cited are relied upon other than the patents to Vernon and to Baker, *et al.*, as there are no assignments of error relative to any of them.

ARGUMENT.

We will, after pointing out specially pertinent and recent Supreme Court decisions, proceed *first* to the consideration of the patent in suit and the infringing structures, the evidence relative thereto appearing in plaintiff's *prima facie* case, unmodified by cross-examination and not in any way met by defendants' proofs.

Second, the defendants' main case will then be considered. As to this it appears that there are proofs showing (A) the use of a certain structure known as the Vernon structure, at Fresno and Los Angeles, the same being a use practically by the California Fruit Cannery Association. The details of the structure appear in Vernon patent No. 784,527, of March 7, 1905 (R. p. 742), which was a modification of and addition to the Baker *et al.* patent No. 616,284 (R. p. 883). These structures were ineffective and were ruled as a matter of fact not to contain the Dunkley invention of the patent in suit. That invention of Dunkley's was installed later, superseding the earlier structures. The affidavit of Robert I. Bentley, which was excluded (see assignment of error No. 24), relates to this Vernon use, the affidavit and evidence being wholly incompetent.

There were also proofs offered (B) as to the Grier prior use at Pasadena, which proved to be subsequent in date to the date of invention of the patent in suit,

and it is as to this use that the inconsequential Kennedy letters relate which are referred to in assignments of error twenty-two and twenty-three.

Third, plaintiff's rebuttal testimony will be considered. The attack of defendants was met by the testimony of Samuel J. Dunkley, the inventor, confirmed and supported by Melville E. Dunkley and by the superintendent of the Dunkley Company, Harvey C. Schau. This showed that the Dunkley invention had been conceived of by Dunkley early in the year 1902 and a machine substantially completed and somewhat tested in the fall of that year, and put into actual operation in July, 1903. It is complained by the defendants that this is only shown by the oral evidence of three witnesses and that there are no documentary proofs. This is an absurd position for the defendants to take. The clear oral evidence of three witnesses should be sufficient. However, in place of any documents, a piece of *real* evidence, the framework of the identical machine itself, is produced and identified in court. A document would have to be a drawing or some description of it. The real thing itself is much the better.

Fourth, defendants' sur-rebuttal will be considered. Thereafter the defendants presented sur-rebuttal proof attacking Dunkley as the inventor and claiming that the invention of the patent was the invention of one Stewart L. Campbell, offering Brunker and Mapes

as witnesses to confirm Campbell's claim. Yet both Campbell and Brunker state that they were directed to proceed with the building of the machine by Dunkley, the inventor himself.

It is thus seen that the matters ruled upon in the trial were *purely matters of fact*, and the finding of the trial court we believe will be found to be at least supported by evidence and consequently "unassailable."

MATTERS OF FACT DECIDED BY COURT BELOW ARE
"UNASSAILABLE" HERE.

The decision below followed a trial in open court, and it is believed therefore that the findings of the court on these questions of fact "must be treated as unassailable." This is the effect of the very recent decision of the Supreme Court of the United States in

Adamson vs. Gilliland, decided Jan. 8, 1917,
reported in United States Supreme Court
Advance Opinions of February 15, 1917, at
pp. 169-170.

Further, the burden on the defendants in proving anticipation by prior use is to prove the facts beyond a reasonable doubt. See

The Barbed Wire Patent, 143 U. S., 275-293,
36 L. ed., 154.

FIRST: THE PATENT IN SUIT AND INFRINGEMENT.

The patent in suit appears at R. pp. 731-739. The defendants' devices were stipulated in and appear in the record as Exhibit A at R. p. 26, and Exhibits B-1 to B-8 at R. pp. 27-34, and Exhibit B at R. p. 35.

Plaintiff's *prima facie* case consists of the testimony of Melville E. Dunkley, R. pp. 61-93.

The description of the patent is very full and complete and is respectfully referred to for a full understanding of the details of the invention. There is no particular technical language, and no expert was necessary to explain its details.

To state the matter very briefly, the Dunkley machine for peeling peaches is a pioneer and a labor-saving device. By its use five men (R. pp. 66-67) working ten hours a day are able to peel 1800 bushels of peaches in a day (R. p. 65). Two of these men are necessary to properly manage the machine and three of the men have for their duty the matter of delivering peaches to the machine and taking care of them at the discharge end so far as that may be necessary.

While this work is done with great rapidity, it is done very perfectly indeed, as only the woolly part of the peel of the peach is removed, no part of the pulp is cut away. The fruit is consequently left full size, uninjured and in perfect condition, and is consequently not only more in bulk when it finally gets

into the can, but is of a higher grade because of its full size and perfect appearance and condition.

The advantages, then, of the invention are very great. It is rapid, it results in saving all of the pulp, all the food value, and it produces a superior product.

Considering briefly the invention as to detail, the patent drawing of the structure is at R. pp. 855-861. Figs. 1 and 1-A when placed end to end show a complete plan, and Figs. 2 and 2-A when placed end to end show a complete side elevation of the machine. The peaches are poured on to the hopper E¹, pass down the incline to the bottom thereof to the upwardly-moving forward end of the endless conveyor D, which picks them up in single transverse rows and layers and passes them into the lye tank B, the lye in which is heated by suitable coils. The peaches are retained upon the upper run of the conveyor D and carried beneath the surface of the hot caustic solution with which they are kept in contact for a period of something less than a minute and until the hot solution has entirely disintegrated the peel. The peaches are then carried by the conveyor out at the rear end of the lye tank and down the inclined chutes F leading to the peeling sprays and brushes. An endless conveyor brush H is made up of a series of brushes with the brush portions projecting outwardly on a belt, and serves to receive and carry the peaches forward very rapidly, owing to the comparatively large dimensions of the pulleys H² for this conveyor.

At each side of the conveyor,—see particularly Figs. 4, 5 and 6,—are disposed rotary brushes K K¹ which revolve up and away from the conveyor, and are disposed and arranged in the structure illustrated, to act upon very small peaches of about one and three-fourths inches in diameter, the much larger path of the peach being indicated by dotted lines in Fig. 5. At each side of the brush conveyor H and beneath the rotary brushes are disposed longitudinal pipes G, G, and between the two brushes and directly above the conveyor brush is also disposed a similar pipe G. These all are perforated at g, as indicated more particularly in Figs. 3, 4, 5 and 6, and deliver on to the passing peaches. There are in practice about 144 of these spray holes in the comparatively short length of the conveyor, and they deliver the sprays under strong pressure to the peaches which are passed quickly between the same. *The spray pipes G, it will be noted, extend somewhat beyond the rotary brushes and act upon the peaches after they have passed beyond the brushes to entirely and completely remove the peel from the same.* The peaches are discharged into a tank at the tail end of the machine or into any other receptacle which may be provided. The brushes are at once soaked and become very soft and non-abrading. The result is that the peel of the peach is first softened by hot alkali of sufficient strength to disintegrate it, the same is delivered *immediately* to the peeling part of the machine where the same are

treated to strong sprays, the peach being rotated in cork-screw fashion to present all surfaces of the same as it is tumbled forward through the very active sprays delivered against the same at pressures varying from forty to one hundred pounds to the square inch. The high speed and perfect work above referred to are the inevitable result.

The witness Dunkley defines and explains the structure, Defendants' machine, Exhibit A, beginning at R. p. 67, in response to inquiry by the Court, as follows:

"A. The peaches are fed into the hopper marked 1, are fed on to the elevator marked 1, and in through the hopper marked 2; I was not allowed to see the inside of that, and Mr. White who accompanied me, said that it was a structure along the lines of all of them used; it appeared to be the Plummer pipe, having bevelled vanes.

"Q. This is the hopper?

"A. This is the hopper with a steamhood over there to carry away the surplus fumes; the peaches are evidently carried through by vanes—

"Q. What do you mean by vanes?

"A. That is supposed to show the hinges on top; this top would raise up, a sort of archimedial screw.

"Q. This is inclosed?

"A. Yes. The bottom is shown pitched here to take care of the drainage and cleaning; this is supposed to be a thermostat which regulates the steam supply to keep the contents at a uniform temperature, and this box, marked 4, is an auxiliary heating box, in which water and caustic soda was placed so that it could be introduced

into this tank without cooling the contents down; as I say, the method of carrying the peaches through this scalding, I was unable to see, but surmised that it was carried on a shaft with a number of vanes which with the archimedial screw motion carried the peaches forward and ejected them here into the drum marked 5. This consisted of a cylinder—if I may read this, the notes that I took at the time—mounted on four trunnion rollers, which rollers are carried by a steel frame and are placed inside of a metal drain-pan, with high metal sides to act as splash guards. The guards are not shown on here; the guards were fastened to this pan under here and came up nearly to the top of the drum. The cylinder was made of a sheet-steel, was approximately 11 feet 10 inches long, and about 23 inches in diameter, the metal being corrugated or fluted; at the bottom of each flute were $\frac{1}{2}$ inch holes, $1\frac{3}{8}$ inches from center to center, extending the full length of the cylinder. These are shown here by the dots. The flutes or corrugations were rounded at the inside apex and sharp cornered at the outside. That is hard to show here, but the inside of this that comes in contact with the fruit was more or less rounded, while the outside was bent sharp at about, I think it is, a little less than right angles. The holes referred to were punched so that the sharp bend, or valley of the flute, bisected each hole. This cylinder was revolvable, as at near both ends was a circular track which rested upon the pulleys attached to the frame work, and at the feed end attached to this track was a rim-sprocket for driving. This is shown here. The driving means were inside this drum; they were not shown here, but it lays in a cradle composed of four rim pulleys, and revolves on these tracks here. Extending through-

out the length of the cylinder and approximately equi-distant from all of its sides was a 2-inch pipe fitted with a series of Oakland Sprays, placed approximately every 8 inches on this pipe. The outside of it was shown right at this point; that extended throughout. This you see, is about the center of this drum; the drum would extend to about down here, and this pipe extended practically the entire length of the drum, and every 8 inches—you see the pipe in this view here—that goes right back through the drum, and about every 8 inches was an Oakland Spray so arranged that it threw the spray downwardly and a little to one side; evidently as the cylinder revolved that carried the peaches more or less away from the center and kept them a little to one side.

“Q. What is an Oakland Spray?

“A. An Oakland Spray is a spray with a nozzle about $\frac{1}{4}$ inch, and has a deflecting blade.

“Q. It was shown here on the former case?

“A. Yes; it makes a fan-shaped jet.

“Q. Something like the character of the appliance used on these more modern street water-wagons?

“A. Yes; it throws a flat spray, fan-shaped. The discharge end of the cylinder is 27 inches above the floor, and the feed end is about 8 inches higher, giving approximately 8 inches pitch for practically 12 feet—11 feet 10 inches; the pitch of this is so arranged that as the cylinder revolves the peaches travel through there on a zig-zag path; they are carried up, and then as they get far enough they tumble off of the projection or flute on the inside which carries them, and they slide down and at the same time slide forward owing to the pitch of the cylinder. The fruit is discharged from this cylinder upon a moving conveyor-table composed of two chains—

“Q. This is the conveyor-table?

"A. Yes. That is composed of two chains with copper or brass—I think they were copper—flights, which made a practically solid table and allowed it to turn as it went over the pulleys. This table was inclosed in a model housing or box, and arranged above the table, and inside of the housing was a series of perforated pipes with the perforations pointing downwardly toward the table, and so arranged that they could spray the fruit as it passed along the table, with a jet of either steam or water. At the end of the discharge end of the table was a semi-bucket type metal elevator to receive the fruit and elevate it to an Anderson-Barngrover peeled peach grader. At the spot where the peaches tumble from the horizontal brass top conveyor—that is shown here—table, on to the elevator were arranged four pipes having an enlarged head sprinkler on each for spraying the peaches as they tumbled down and on to the elevator to give them a final cooling and washing; that is given on this drawing as No. 8.

"Q. And the elevator is No. 9?

"A. No. 9. The face of the sprinkler heads was filled with a multitude of fine holes, approximately one thirty-second of an inch in diameter; the face of this sprinkler I should say was about 4 inches.

"Q. These heads are so directed as to spray not only as they come out of the drum but as they go up the elevator?

"A. Yes, as I understand the use of these steam hoses, the practice in some places is to use steam and some places hot water; I have seen both used.

"Q. You mean for peeling purposes?

"A. No, for blanching and washing. Another matter, which I don't know as it has any bearing on this case, was the machine which stood unattached near this machine and which could be

readily set in to this cylinder, was a Thomas Monitor Tomato-scalding and Peeling Machine; that is a standard machine."

The witness Dunkley defines and compares the operation of the two machines at R. pp. 72 and 73, as follows:

"The operation of the two machines, according to my opinion is very similar. In the machine of S. J. Dunkley the peaches are turned as they are acted upon by the sprays, by the two brushes K and K, and more or less by the—I think I have these numbers right—by the conveyor brush; in the machine having the cylinder practically the same action takes place, and the peaches follow nearly the same path as they go through the machine; in the Dunkley machine the peaches will go through in a zig-zag, something like that (illustrating); in the other machine the peaches will go through in a path more or less like that (illustrating); it may be somewhat exaggerated.

"They will be carried up and slide down; at the same time they will be acted upon more or less by the brushing action of the interior of the cylinder which in comparison with this is perhaps the same as an external gear and internal gear in its action and at the same time they will be so turned that the jets of water will be able to cover the surface of all the individual specimens."

The witness explains the operation of Defendants' Machine Exhibit B, beginning at the bottom of R. p. 76:

"The sketch given in the stipulation" [referring to Exhibit B in conjunction with the photographs

Exhibits B-1 to B-8, and their operation is compared further on], "shows a little better idea I believe than the photograph of the action of the machine, and if I am not mistaken I believe that is a similar design to one of the Beekhuis patents; if properly hooked up with sprays and proper operation, I see no reason why it should not peel peaches; to what extent would be hard to say, or as to capacity.

"From the photographs, the peaches are first treated in a so-called grasshopper scalding, which is shown in No. 8, and this is practically the same type of scalding or peach-treating machine that was shown in the other case; in this peaches are dumped in bulk into the tank part, into this part here (illustrating); it is not covered over in this machine; this usually contains a solution of caustic soda and either perforated or radiating steam pipes to keep it at a high temperature and the peaches after going into here are carried by an archimedial screw up through the conveyor and dropped on to the shaker-table which is shown in the sketch."

This was developed and confirmed on cross-examination and no testimony was offered by the defense to in any way modify or vary this proof as to the precise identity and principle of the defendants' machines with that of the patent in suit.

The claims in detail are readily understood and will not need to be reviewed in detail here. The finding of the court is quite conclusive as to the comparison, there seeming to be no question as to the infringement in the event that the patent was held to be good and valid.

As typical of the claims in issue we quote claims 19 and 21, viz.:

"19. In an apparatus for treating fruit, such as peaches, means for removing previously disintegrated skin from the fruit, including a support for the fruit, means for effecting a change of position of the fruit on said support, and means for directing peeling water jets upon said fruit.

"21. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing peeling jets of water at intervals upon said fruit as it advances."

SECOND: DEFENDANTS' MAIN CASE.

Defendants' case comprises (A) the Vernon anticipation and (B) the Grier anticipation.

(A). As to the Vernon anticipation, the following witnesses were sworn:

Baker (R. p. 100) identifies himself as one of the inventors of the Baker, Chalker, *et al.* patent No. 616,284, R. pp. 883-6, Defendants' Exhibit F. The Baker machine was installed under the direction and authority of C. J. Vernon, whose machine appears in Plaintiff's Exhibit 11, R. pp. 742-4, where the brush section is indicated as a "brushing machine 17" (R. p. 744, line 3) and no sprays being illustrated in the patent. The machine Baker refers to is the machine of the Baker patent and made in accordance therewith, where it will be observed that there is a

conveyor (R. p. 883) with flights *e e* therein moving *slowly* over small pulleys F and carrying the fruit between brushes which rotate in contact with the fruit (see Fig. 3) and brush down against the same. The fruit treated was oranges and a little water was drizzled on to the same from pipe I from the tank N, as there illustrated. It appears that there was substantially never any pressure on the water that was delivered to this brushing machine at the Fresno plant.

Baker's testimony as to details other than that his machine is made in accordance with the patent is very indefinite and uncertain and does not show a machine operating like the Dunkley.

Way (R. p. 124) was called to testify about this Vernon machine which embodied the Baker brush structure. His testimony is wholly unsatisfactory as to any details. His knowledge of the business was not sufficient to give him an understanding so that he could testify intelligently. There is no question that Vernon had a machine of some kind at Fresno as early as the peach peeling season of 1902, but it was not a machine working on the principle of Dunkley, and the lower court so found.

Cobbey (R. p. 146) was another witness who testified about the Vernon machine with the Baker *et al.* brush device. He was mixed up in his dates. His testimony is wholly unsatisfactory in details and does not show the existence of a spray machine, but merely

of a brushing machine with some water drizzled on to the fruit to soften it so it could be brushed.

Combs (R. p. 170) is of like character to Cobbey's testimony, as is also the testimony of *Lushbaugh* (R. p. 181); also *Hickey* (R. p. 197).

Robert I. Bentley (R. p. 215), manager of the California Fruit Cannery Association, was called, and his affidavit made in the Public Use Proceedings was read to him, which affidavit was objected to as immaterial, irrelevant and incompetent (R. p. 221), and the inquiry as to the affidavit and the affidavit itself were ruled to be not only immaterial but incompetent. A license from the Dunkley Company was shown, which merely shows the adverse interest of the witness.

There was an attempt on redirect examination to introduce the Kennedy correspondence, the witness denying having received the Kennedy letter, and the court ruled (R. p. 232) "Manifestly, that letter would not be admissible as against this plaintiff; that is mere hearsay."

The proofs therefore did not establish the use of any machine comparable with the Dunkley until 1904 at the earliest, which was long after Dunkley had developed his invention.

The witness *E. H. Kennedy* (R. p. 393) was called. He testified as to hearsay on the Grier machine which will be adverted to later on.

It was attempted to show by Kennedy that the

Vernon machines were successfully operated in 1903 at Los Angeles (R. p. 394-5). The witness' attention was directed to his old letter book (R. p. 400) and he recollected the use of acid to correct the lye, saying at R. p. 401:

"Q. But there was a formula with some hydrochloric acid or something of that kind to neutralize the alkali on the peaches?

"A. There was something, yes.

"Q. You used that, didn't you?

"A. Yes, it was used there; I don't know what it was.

"Q. That corrected any discoloration of the peaches due to the lye, I suppose?

"A. I do not think so; I think it probably assisted, but I do not think it would remove it."

Lambert (R. p. 412) was called to confirm the Vernon use at Fresno and did not prove to be even cumulative as to what had been already stated.

This testimony is wiped out by the documentary proofs, Defendants' Exhibit F (*Baker et al.* patent), which shows what was incorporated in the Vernon machine, and is not comparable with the structures made use of by Dunkley, and by Vernon's own patent, Plaintiff's Exhibit No. 11, R. p. 742, where the structure is referred to at p. 744 as a brushing machine 17. Vernon's machine amounts to a scalding and brushing machine and was superseded by the machine of Beekhuis. Beekhuis was the defeated party in the interference in the United States Patent Office with Dunk-

ley. His machine is illustrated at R. p. 748-753, Defendants' Exhibit A, his application having been filed May 25, 1904, and his invention coming long after Dunkley's invention.

Plaintiff's witness *Fontana* (R. p. 470) pointed out that he assumed charge of the factory at Fresno in February, 1904, and that he found an arrangement of devices which would not give water pressure because he found a $1\frac{3}{4}$ -inch service cock running into a 2-inch line (R. p. 472), which means that the pressure obtained would be of no consequence. He was familiar with Beekhuis' experiments in 1903 at Hanford, and saw the same explained to Mr. Monte (R. p. 473).

The witness testified that he found a pump there at Fresno taking care of the 2-inch line (R. p. 474) and says:

"they were not getting enough water; when I put in the 4-inch line, I just put the pump up for the peeling system, and nothing else; instead of to suck the water from the main, it was to force it through the sprays."

This witness was not cross-examined.

Defendants' witness *Dawson*, assistant general superintendant of the California Fruit Cannery Association since its organization in 1899 (R. p. 632), was familiar with the plant of the company at Fresno in 1902-3, it being a Vernon machine (R. p. 633). He testified that two or three such machines were in-

stalled in 1903 in the canneries of the company, saying "I don't know what became of them" (R. p. 633). He says that they were succeeded by "what were called the Beekhuis machine" (R. p. 634) and that the Beekhuis machines are still in use. In response to inquiry, "Why were the Beekhuis machines substituted for the Vernon, if you know?" he said:

"We were not satisfied with the Vernon machine; it would not do the work just as we would like to have it done."

The court was justified in ruling that the Vernon machine was not the Dunkley machine and did not anticipate it.

(B) AS TO THE GRIER ALLEGED ANTICIPATION:

Finley (R. p. 235) testified in effect that in or about April or May, 1903, he began the construction of some tanks for G. E. Grier of Pasadena, for use at the plant of the Pasadena Canning Company and at the Eastside Canning Company in Los Angeles. He testified that a scalding machine was installed and sprays were introduced. A structure appears to have been produced like the photographs marked B-1 to B-8 inclusive. Witness said they were finished in July, 1903; thinks they were put in *public* use but there is no evidence to that effect, the contrary seeming to be the fact because there was a sign put up "Keep out" (R. p. 251). The machine was first tested on July

28th or 29th (See Grier's testimony, R. 311) and was not made use of until August, 1903.

Lusby (R. p. 275) was a bookkeeper for Grier and his information would only support some date in 1903 or later for the Grier machine. He showed an item with the Eastside Canning Company for labor, etc., July 30, 1903, for 4 Convey Vats (R. p. 297). Otherwise the items are of no consequence and that item is not very definite as to a peach peeling machine, yet the testimony goes to establish that Grier did something in the late summer of 1903.

Grier testified as to his own endeavors beginning at R. p. 282, a portion being interposed in the *Lusby* testimony, where he identified some books as having been in his possession. His real testimony begins where he is recalled, at R. p. 301. He testified to a matter of dipping peaches in lye, as early as 1891, and thereafter washing the peaches. In 1902 he formed a partnership with Mr. Taylor (R. p. 304) and leased the Pasadena Packing Co. plant in Pasadena. He says, R. p. 304:

"about the middle of August or about that time, I was down to see Mr. Taylor, with my partner, and he told me that it was all foolishness to try to continue with the peeling of whole peaches; he said you could peel halves after pitting just as well, and he demonstrated it to me in the factory and I immediately went back home and changed the proposition from a whole peach to a half peach."

He says, R. p. 305:

"I conceived the idea right then of building a machine to do the work more rapidly, and the machine that I built in 1903 was the result of that conception."

He states that in April he employed Finley to begin building the machines. He fixes the time of completion of the work on the machine built for the Eastside Canning Co. as early in August, at which time a pump was supplied for increasing the water pressure on the jets. This occurred, he said, "early in August, I think the 3rd" (R. 312). All of which dates are *later* than that absolutely proved by Dunkley.

Mr. Grier's cross examination indicates certainly that he had no particular conception in 1902. He had heard of Beekhuis (R. p. 336) and knew of Beekhuis' machine. Grier discontinued his particular machine when Dunkley served notice upon him.

C. L. Kennedy (R. p. 349) was called to confirm Grier but of course could not carry Grier's date back of the date established by Grier.

Herman (R. p. 354) was called to support Grier's statements, which he did very ineffectively.

Mrs. Grier (R. p. 360) testified as to what Grier was doing and as to discussions, but nothing is claimed to have been done until the spring of 1903.

Waterhouse (R. p. 372) was called to support Grier's statements. *Taylor* (R. p. 376) was also called to support Grier. *Miss Mayes* (R. p. 385)

was called to state her acquaintance with Grier and what she saw, all of which did not carry Grier's date back of August, 1903. The same is true of *Stetson* (R. p. 388) and of *Sanborn* (R. p. 391).

E. H. Kennedy (R. p. 393) was called to support Grier's statements and his support was *purely hearsay*, consisting of a letter of August 5, 1903, which he wrote to the California Fruit Cannery Association. It contains a hearsay statement and was refused admission and consideration by the court. The letter refused appears at R. p. 398-399, the ruling of the court being at R. p. 398:

"It is not competent for showing that he was using it; he has already testified to it; the objection is sustained."

The expression that "he was using it" refers to the use by Grier. It appears that the witness had been instructed in 1913 to investigate certain facts and his report thereon would not indicate that the matter of this letter of August 5, 1903, was of any particular consequence in that behalf. The letter was properly excluded.

Specifically, it was unnecessary to offer any evidence regarding Grier's work, so far as the defendants were concerned, because Dunkley's invention and reduction to practice entirely and completely anticipate the Grier dates. In view, however, of Grier's confession to an acquaintance with the Beekhuis ma-

chine, we are constrained to believe that his inspiration came from Beekhuis, and that really the development was somewhat later, for the striking similarity between his machine and that of Beekhuis would indicate that either Beekhuis derived something from his acquaintance with Grier's doings or Grier from his acquaintance with Beekhuis. We presume Grier got it from Beekhuis. However, it was wholly unnecessary for plaintiff to dig into the matter or develop it in any way because it was too late to have any effect upon Dunkley's invention. The matter could only be of academic interest and investigations of this kind involving thousands of miles of travel are, to say the least, not inexpensive.

THIRD: PLAINTIFF'S REBUTTAL TESTIMONY.

Melville E. Dunkley's testimony begins at R. p. 413. He points out that his father, S. J. Dunkley, explained and disclosed matters pertaining to the invention to him early in 1902, the lye proposition not appealing to him (R. p. 415). He identifies the time as following a year when some additions to the factory were made. Mr. Samuel J. Dunkley, his father, the inventor, was excluded from the room while he was testifying. He refers to the frame of the machine standing in the room and said (R. p. 416):

"we started in getting ready to put that machine together in the early part of 1902. The season,

of course was very busy and I was back and forth from Hartford so that the machine was not finished until toward the late fall of 1902; we got perhaps a few bushels of peaches through there using an ordinary galvanized tub and a basket of some kind to scald a few bushels of peaches in order to get work enough done to see whether the matter was going to be practicable or not. We, however, were very well satisfied with the results. * * * That was built and set up with this first experimental machine at South Haven in the early summer of 1903. Later that year there was another machine built and put in operation."

He explained the development of the machine from then on and the shipment of a machine to Chico, California, saying specifically at R. p. 418:

"The first complete machine including the scalding and the peeler was operated at South Haven in 1903. The scalding was delivered in April I believe, of 1903, and the machine was set up at South Haven as soon after that as we could get to it, and we started practical operations on that line as soon as the Georgia peaches came into the market at Chicago, which is usually early in July."

"Q. Then you would fix the date for the first successful operation as when?"

"A. *In July, 1903, for the commercial operation of the machine.*"

The brush part and the spray parts were successfully operated in the *fall of 1902* (R. p. 418). The history of the business from then on was developed by the witness. A protracted cross examination did not change this testimony but only confirmed it.

Plaintiff also offered the testimony of *Samuel J. Dunkley*, the inventor, in rebuttal (R. p. 475). Mr. Dunkley is an inventor of many fruit handling and canning devices, having taken a large number of patents, as appears in Plaintiff's Exhibit 9, Dunkley Canning Patents. He states the circumstances, so far as the invention of the claims in suit is concerned. He pointed out his own history beginning in the late '80's, how he built a factory at Kalamazoo and a plant at South Haven, and developed a business where he was using close to a million cans per year. He was bothered about peeling, and the peaches used to spoil from Saturday over Sunday to Monday, and he says, R. p. 478:

"in September, 1901, it occurred to me that caustic soda might possibly be used in peeling peaches."

He found that caustic soda would make the skin soft. He says at R. p. 479:

"*In August, 1902*, I told my son about the matter and we made some experiments and concluded it would be worth while to build a little experimenting machine and try it out; so I gave him the instructions and then the machine was finished and hooked up and we tried it; I put up some canned goods, a few cases and the next spring was satisfied that it was all right and then we went ahead and built the apparatus which is practically the same as at the present time."

"*In July, 1903*, the apparatus was completed and tried out—*about July 15*, that is, when the southern peaches got up."

He says the machine was kept there in the factory and he identified the old frame. It is offered in evidence at R. p. 480, as Plaintiff's Exhibit 10.

The extent to which Mr. Dunkley gave attention to details was pointed out. The complete success of the machine was shown. Cross examination did not modify his statements. It developed that there was an interference in the Patent Office with Beekhuis and that in that interference it was clearly stated that the complete invention was installed in July, 1903, but it did not tell about the incomplete machine set up sufficiently for a try out in the fall of 1902. Because that was not done the defendants complain that Dunkley has changed his testimony, which is not the fact. The lower court found as a fact that there was no essential difference between the testimony given by the Dunkleys in the Patent Office and that given by them in the case at bar (R. 697).

The testimony of the Dunkleys is confirmed by the testimony of *Harvey C. Schau* (R. p. 513). He was in the employ of the Dunkley Company at different times from 1898 to 1908, and from 1902 to 1908, except for a little while in the winter of 1902, he worked for them continuously. He is familiar with the method employed in peeling peaches and says at R. p. 514:

"Until 1903 they were peeled by hand or by a little hand machine; beginning in 1903 they commenced to use what we called a lye process; be-

ginning in 1904 the peaches were *all* peeled by the lye process."

Considering experiments he said, R. p. 514:

"I saw an experiment with some peaches in a wire wastepaper basket in July, 1902."

"At South Haven, M. E. Dunkley was the man who did the experimenting."

"I left South Haven in the first of August, 1902, and went to Hartford, and I was there until the 1st of November; the first of November I came back to South Haven, and there was installed in the basement of the north wing some machines that I had never seen before and one of these was as I was afterwards informed—was a machine for peeling peaches.

"Q. What date was that?

"A. The 1st day of November, 1902."

He fixes the time precisely by pay day and other circumstances. He knew that the machine was still in existence and identified the framework of Plaintiff's Exhibit No. 10 as that machine.

He next observed the process early in the next summer (R. p. 515), saying he believed he observed the machine in operation "either the day before or the day after the 4th of July," 1903. His opportunity for observing in 1903 is explained at R. p. 516:

"In 1903 I had charge of what we call the machine-room, or it was the Automatic Vacuum Canning Company machine, we call them vacuum machines and double seamers for making the

closure on the can; that room was located at the extreme west end of the main room, and the line extended east from there; these peeling-machines were at the extreme east end of the room."

The peach machines could be seen from the place of his employment.

Cross examination did not in any way modify his testimony, but only confirmed it. The machine is identified completely.

This rebuttal testimony, therefore, in view of the testimony explaining the Vernon machine, shows conclusively that Dunkley was prior in date of invention to either the Vernon or the Grier machine.

FOURTH: DEFENDANTS' SUR-REBUTTAL.

CAMPBELL DEFENSE.

The defendants were in desperation and were then forced to play their last card. The defendants' sur-rebuttal testimony consists of the testimony of Stewart L. Campbell, beginning at R. p. 523 and closing at R. p. 549; Brunker, R. p. 598, cross at R. p. 604-632; and Mapes, R. p. 636-651, supposed to support Campbell.

Campbell's testimony is most remarkable. Campbell was an employee of Dunkley (at \$60.00 per month and later raised) from about the first of December, 1902, to December, 1904. He testified (R. p. 523-4) that he had had no previous experience with canning machinery but made a peeling-table

in July or August, 1903, which dates were kept in an incomplete memorandum which he referred to as a diary book because, forsooth, it was marked diary on the outside. He says in response to question (R. p. 528):

"Q. You have referred to a lye machine; please state the circumstances under which that machine was made and what it was and when it was made.

"A. Well, they had to have a lye machine to lye the peaches for the peeler and about August, 1903, the first experimenting with the lyeing of the peaches was made, and *then I conceived the peeler*—they wanted a lye machine for lyeing the peaches; *Mr. S. J. Dunkley gave me the order to construct a lye machine* so I went to work and made a drawing of the tank after I had figured out the way I wanted it, I made a drawing of the *tank* and handed it to him to have the tank made of boiler-iron, and he gave the order at Kalamazoo, either gave it or sent it to Kalamazoo."

He says (R. p. 528):

"A. I can check it up from the entries I have got here of the material for it."

No bills were produced or anything of that kind.

After the recess until 2 P. M. (R. p. 525) counsel for defense *resumed* the examination:

"Q. This morning you mentioned a peach peeling-machine constructed at the Dunkley factory. I request that you give the history of that

machine from the beginning to the end, if you know the same?

"A. In 1903 *Mr. Dunkley*, in I think about August, along in August, *told me that he wanted me to build a peeling-machine for peeling peaches; that he had a man making experiments on the lye strength of it and so forth, as to how to take the peeling off the peach, and he wanted me to construct the machine, and I was to see him and get the data on the lye, what was required and go ahead and build the machine; that was while I was working on this peach-table, peach peeling-table.* After I got through, I went over the next day or a day or so afterwards to Mr. Brunker, who was the one that was *making the test on the lye; it was in the glass room attached to the main canning room, and he showed me what he had done with the lye and gave me an estimate of the time that they ought to be in the lye and the strength of the lye; he was using a hand brush and water after putting them through the lye, using the hand brush and water and rubbing the peeling off, and so from that work on the table I was figuring out just how to go to work at it, to construct it, and I think it was on the 9th, I am not certain, that it struck me about how to tackle it.*"

And the Court inquires (R. p. 530):

"Q. You had not been given any ideas at all by Mr. Dunkley?

"A. No, no ideas at all whatever, and this idea of using the circular brushes and the running belt for the brush, is what I decided on to try out; so I told Mr. Dunkley what I figured on and made a sketch of it, I drew a sketch of it and showed him and he thought it was feasible and I should go to work and go ahead with it; etc."

He testified about the sprocket chain and also how he had made a test with *Mr. Brunker* and *no one else present* (R. p. 532-3).

The witness identified Plaintiff's Exhibit No. 10, saying (R. p. 535):

"A. That looks like the frame of the original model."

then, after examining it, said (R. p. 535):

"A. That is the framework and the pulley of the original machine and boxes; the brushes and drive wheels and gear or friction are not there."

This testimony is extraordinary, as it shows that Mr. Dunkley, the inventor, was the inspiring cause. Mr. Campbell, on cross examination, *confessed* (?) to being the inventor of all the structures which had been patented in Dunkley's name, although he had never had any experience whatsoever in the canning business up to that time and Dunkley had been at work at it all his life. The Court during cross-examination asked Mr. Campbell (R. p. 562):

"Q. How do you account for his" [referring to Dunkley] "just simply saying, ' * * * you go to work and build it,' without giving you any suggestion?"

"A. I did not attempt to account for it any more than he" [Dunkley] "thought I was pretty handy."

This would be a very strange way to account for

the production of such a machine. Machines of such novel character are not produced so easily. Mr. Campbell gives a strange explanation of his quitting the employment of the Dunkley Company (R. p. 564), stating that he wished money and not stock and that although the offer was gratuitous, according to his own story, he was much insulted.

Campbell's trip to Boston, referred to at R. p. 572, had no connection with the peach peeler business so far as his testimony developed. It appears that Campbell referred to Bruncker and yet at R. p. 588, he says:

"Q. Did Mr. Bruncker make any claim that he had invented anything to you?

"A. No; just the reverse; he told me that he knew nothing about machinery."

At R. p. 589:

"Q. What information was it he imparted to you, as you say, according to your instructions from Mr. Dunkley?

"A. I told him Mr. Dunkley had told me to work, test this lye out there in the peach business when I went to him; I also told him Mr. Dunkley sent me there to get this data at the time.

"THE COURT—Q. What data was it exactly that Mr. Dunkley sent you to Bruncker to get?

"A. It was data in regard to the experiment that he made on the handwork of the peach-peeling; he did the experimenting there with hand, to get the strength, and time, and so forth; I remember distinctly him telling me that these peach-

es had to be kept separated in the lye, because the spots where they touched together they were not liable to be properly lyed, and the peeling would stick on the peach; that is the reason why I separated them in running them through the lye-tank; I kept them so that they would separate as much as possible and still do it with speed."

Campbell having testified as to the friction gear, the Court examined him at R. p. 593-4, and he was unable to identify and explain how the friction gear was used on Plaintiff's Exhibit No. 10. The witness's attention was called to the friction gear in Fig. IV of one of Dunkley's patents, namely patent No. 805,844. The witness recalled no such friction gear.

The witness confessed to receiving from defendants \$500 and expenses for the work he did in their behalf in connection with this suit.

The testimony of Campbell was given in open court. Not only was that testimony carefully weighed, but his appearance, demeanor and mode of testifying were noted by the trial Judge. In fact the Judge personally took part in the examination and propounded questions to Campbell, and announced at the trial that Campbell's testimony was too improbable for him "to give it any credence" (R. 690). And after submission of the case the court again considered the evidence and said:

"I indicated at the trial, and my mind has been only confirmed in that view by my review of the evidence, that I could not extend the limits of

my credulity sufficiently to put credence in the testimony of Campbell. That he worked for the plaintiff at or about the time that he claims, there is no question, but that the claim he puts forth as to what he did in the premises, and the time it was done, is entirely beyond my ability to believe."

Brunker (R. p. 598) was called as a witness and he also told an improbable story indicating that he had nothing that showed that Dunkley was not the inventor or that Campbell was the inventor of the machine of the patent in suit. He was in the employ of the Dunkley Company a very brief time. He says at R. p. 600:

"He" [Dunkley] "said, 'It is going to work all right, we will have to get a machine for that, for what you are doing with your hand.' * * * 'we will get Stewart to build that.' That was Campbell, he was superintendent; and he says, 'You and Campbell get together and you show him what you want done and he will make a machine to do it.' So the next day Campbell came in to me and told me that Mr. Dunkley had said that he was to build a machine."

thus showing that S. J. Dunkley was the moving cause in each and every instance.

Witness was surprised at the date of the letter indicating that he was not at South Haven at as early a date as he testified (R. p. 610), the letter appearing at R. p. 612. Brunker testifies as to a friction gear, but his recollection is not confirmed by anything.

This is very weak stuff which is put up to anticipate a valuable patent. It appears from defendants' own evidence that Dunkley was the moving cause in each instance.

The testimony of Mapes (beginning at R. p. 636) is that of a mere machinist who ran a shop at South Haven. He had at one time attempted to appropriate a cherry pitting machine from the Dunkley Company. He kept a memorandum of work done for various concerns, among which are pulleys for a peach washer or something of that kind that were furnished to the Dunkley Company in 1903. His testimony does not negative anything that happened in 1902 and does not support the testimony of either Campbell or Brunker. Such uncertain testimony should not be regarded in a court of justice as anticipating or wiping out valuable rights which have cost thousands of dollars and are the result of long years of experience and the expenditure of a great deal of energy and time.

THE DECISION OF THE COURT BELOW.

We submit that the ruling of the Court below, when this testimony is considered in detail, is entirely proper and in fact could not well have been otherwise, when the rules of evidence in such cases are considered. The Court in its opinion (R. p. 696) points out that the Beekhuis matter was wiped out because Beekhuis was in interference with Dunkley in the Patent Office,

and the Court of Appeals of the District of Columbia decided in Dunkley's favor. Recently there has been a decision in Dunkley's favor awarding to him the process involved.

The Court says (R. p. 697) :

"As to the *Vernon* device, it had been in use in Fresno as early as 1902 or 1903. I am unable to hold that that device was an anticipation in its essential characteristics. It operated upon a *fundamentally different principle*. That was an adaptation to the purposes for which the plaintiff's device was used, that of peeling peaches, of a device by *Baker and another* for scouring oranges for the market; it had a *system of revolving brushes*, and it used a *saturation or douche of water for the purpose of softening* the brushes and of washing the fruit; but the essential *operative principle there was the brushes*. They were for the purpose of scrubbing and *washing the hard outer surface* of the skin of the *orange* and of freeing it from mould and other detrimental substances which interfered with its marketability, and the essential principle was the operation of the brushes. The *water* was used, as I have suggested, only for a *saturating and washing purpose*."

The Court adverts to the fact that the *Vernon* patent does not point out the features. The Judge concludes as to *Vernon*:

" * * * *I am therefore unable to hold that the Vernon device, which was subsequently patented—I think in 1905—can be regarded as an anticipation of the device or the conception embodied in the plaintiff's patent.*"

As to *Grier*, the Court says that it is a close question to determine who had the first conception. He says (R. p. 699) :

“Grier never has applied for a patent, I believe, and the evidence tends to show that *upon its coming to his knowledge that it infringed the device of plaintiff, he abandoned that particular device and adopted another.*”

He then says that the *main* reliance in the evidence is upon the testimony of *Campbell* and that of *Brunker*, and the Court reaches the conclusion (R. p. 699) :

“In its essential substance I regard the *evidence on behalf of the plaintiff as making a case substantially free from doubt*, that the plaintiff’s assignor conceived this device and put it to use at a time *at least a year prior to the time claimed by Campbell*; and as this is a question on which the case turns, the result is that the decree must go for the plaintiff.”

This we earnestly urge is abundantly supported by the testimony which we have thus briefly reviewed.

THE LAW.

Testimony of anticipation, as we pointed out in the beginning of this argument, must be beyond a reasonable doubt. See

The Barbed Wire Patent, 143 U. S., 275, 36
L. ed., 154.

We are very confident at this juncture that the law is settled by the United States Supreme Court, that a finding of fact determined in open court trial in a district court must be, to use the language of that Court, "treated as unassailable."

The attention of the Court is most respectfully directed to the recent decision of the United States Supreme Court in *Adamson vs. Gilliland*, decided January 8th, 1917, reported in the United States Supreme Court Advance Opinions of February 15, 1917, at p. 169-170.

This decision, it is believed, is very pertinent and shows the law applicable to findings of fact by the district court in a case like the case at bar. The following language of the United States Supreme Court, appearing at p. 170, is here quoted for convenience:

"There is no doubt that the defendant had castings made. The essential question is the time when they first were made. We shall not discuss the evidence of those concerned in the making beyond recurring to the impression that the witnesses made upon the district judge, and mentioning that a dray ticket relied upon as fixing that date appears to have been open to grave suspicion from its character, marking, and other details. Considering that a patent has been granted to the plaintiff, the case is preeminently one for the application of a practical rule that so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' *Davis v. Schwartz*,

155 U. S., 631, 636, 39 L. Ed., 289, 291, 15 Sup. Ct. Rep., 237. The reasons for requiring the defendant to prove his case beyond a reasonable doubt are stated in the case of *Barbed Wire Patent (Washburn & M. Mfg. Co. v. Beat 'Em All Barbed Wire Co.)*, 143 U. S., 275, 284, 36 L. Ed., 154, 158, 12 Sup. Ct. Rep., 443, 450. Upon these considerations and a review of the evidence we are of opinion that the decree must be reversed."

The authority cited by the Supreme Court, *Davis vs. Schwartz*, 155 U. S., 631, 39 L. ed., 289, has the following language:

"1. As the case was referred by the court to a *master to report*, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Revised Statutes, § 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, *it must be treated as unassailable. Wiscart v. Dauchy*, 3 U. S., 3 Dall., 321 (1: 619); *Bond v. Brown*, 53 U. S., 12 How., 254 (13: 977); *Graham v. Bayne*, 59 U. S., 18 How., 60, 62 (15: 265, 266); *Norris v. Jackson*, 76 U. S., 9 Wall., 125 (19: 608); *Mercantile Mut. Ins. Co. v. Folsom*, 85 U. S., 18 Wall., 237, 249 (21: 827) 833; *The Abbotsford v. Johnson*, 98 U. S., 440 (25: 168)."

A reference to the decision of the Circuit Court of Appeals for the Eighth Circuit, in *Gilliland vs. Adamson*, reported in 227 Fed. Rep., 93, shows the question of fact involved to be very similar in character to the questions of fact involved in the case at bar. The Circuit Court of Appeals said at p. 93:

"The only question involved is one of *fact*, and that is whether the vulcanizing device patented by appellee was made, used, and sold by appellant prior to appellee's alleged invention."

After considering the matter on which the district court made its findings, the Court of Appeals for the Eighth Circuit, which was the decision reversed by the Supreme Court, said:

"Those facts demonstrated beyond a reasonable doubt that the appellant used and sold a vulcanizer embodying all the features contained in appellee's patent, not only before the patent was issued, but even before the idea became definitely formed in appellee's mind. Therefore the decree of the lower court must be reversed, with direction to dismiss appellee's bill."

This finding of the Court of Appeals for the Eighth Circuit is the finding that was reversed by the Supreme Court in the language first above quoted. We believe, therefore, that the findings of fact in the case at bar should, in view of the open court trial under the new rules, to use the language of the Supreme Court, "be treated as unassailable."

The law as to the degree of proof required here is fully discussed in a decision of this court in *Diamond Patent Company* vs. *S. E. Carr*, 217 Fed., 400, and consequently it will not need to be expanded upon here, that anticipation must be complete and proved beyond a reasonable doubt.

CONCLUSION.

The conclusion seems quite inevitable under all the circumstances, under the law and all the facts in the case. We confidently submit that the decision and decree of the Court below must be affirmed at defendant-appellant's cost.

Respectfully submitted.

FRED L. CHAPPELL,
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Kalamazoo, Mich., March 7, 1917.

JOHN H. MILLER,
Of Counsel for Appellee.

Note—At the time of writing this brief we have not yet received a copy of appellant's brief, and therefore reserve the right to apply to the court for permission to file a reply brief after the appellant's brief shall have been received.

F. L. C.